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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

MICHAEL A. LEBRON,
Petitioner,
v.
NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK),
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM, NATIONAL WOMEN'S LAW CENTER, PEOPLE FOR THE AMERICAN WAY, PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, INC., AND WOMEN'S LEGAL DEFENSE FUND AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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CONSENT OF PARTIES

Petitioner and respondent have consented to the filing of this brief pursuant to Rule 37.2 of the Rules of this Court.[1]

INTEREST OF AMICI

NAACP Legal Defense & Educational Fund, Inc., National Asian Pacific American Legal Consortium, National Women's Law Center, People for the American

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[1] The letters of consent are being filed separately herewith.

Way, Puerto Rican Legal Defense and Education Fund, Inc., and Women's Legal Defense Fund (collectively the "Civil Rights Amici") are national organizations dedicated to protecting and promoting civil rights in the United States. In furtherance of that goal, the Civil Rights Amici have long fought to ensure that individuals have access to federal causes of action for violations of federal constitutional rights since such claims are a critical component of safeguarding those rights.

For more than 30 years, this Court's decision in *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961), has protected civil rights precisely because it rejected a mechanical, label-oriented approach for evaluating whether state action was present in particular instances of discriminatory or liberty-restricting conduct. Instead, the fact-specific test mandated by *Burton* elevates the substance over the form of a private actor's relationship with the State. In doing so, *Burton* has made an invaluable contribution to civil rights in this country and is an integral part of our civil rights enforcement fabric.

With the swipe of a pen, the divided Second Circuit has struck a potentially serious blow to civil rights in this country. Claiming in a footnote that *Burton* is in disfavor with some commentators, the court essentially disregarded *Burton*'s fact-specific test. In fact, it simply accepted Congress' simple statutory characterization of Amtrak as a nongovernmental entity.

The Second Circuit's superficial application invoked the words of *Burton* but not its spirit. Indeed, had the court considered the totality of the interrelationship between the National Railroad Passenger Corporation ("Amtrak") and the United States government with respect to the challenged decision, it clearly would have found state action since the facts relating to government involvement here are even more compelling than the facts in *Burton*. The decision below is of grave concern to civil rights organizations since it clearly shows the extent to which a formalistic state action doctrine can erect an insurmountable barrier for aggrieved persons who seek to redress constitutional injuries.

Accordingly, the Civil Rights Amici have a vital interest in having this Court reverse the Second Circuit's erroneous decision.[2]

SUMMARY OF ARGUMENT[3]

The Second Circuit erred to the extent that it failed to pierce the veil of Amtrak's putatively private conduct to perform the fact-intensive analysis mandated by this Court's decision in *Burton* v. *Wilmington Parking Authority*. Had the court truly considered the totality of the facts and circumstances, it would have found that the challenged conduct in the instant case constituted government action. This Court should reverse the decision below because it is inconsistent with this Court's longstanding application of the state action doctrine.

First, effective civil rights protection in the United States has depended in large measure on access to federal causes of action that prohibit all levels of government (federal, state, and local) from avoiding their constitutional obligations. This level of protection has been made possible to a great extent by application of the state action doctrine envisioned by the Framers of the Fourteenth Amendment and formalized in *Burton*. The decision below is contrary to the rationale of *Burton*; it is inconsistent with this Court's decisions that have consistently applied *Burton* and the intent of the Framers; and it disregards the historical importance of the state

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[2] Statements of interest submitted by the individual amici are included in an appendix hereto.

[3] To avoid unnecessary duplication, the Civil Rights Amici will not add to the argument of amicus American Civil Liberties Union —a position with which Civil Rights Amici agree—that the amount of state involvement necessary to establish state action should not be greater for First Amendment claims than for equal protection claims.

action doctrine in the enforcement of civil rights in this country.

Second, the underlying rationale of *Burton*—that a court must consider and weigh all facts and circumstances to determine nonobvious state involvement—is particularly urgent at the present time since there is a trend at all levels of government to delegate a wide variety of public functions to private corporations and entities. As the line between public and private functions becomes increasingly blurred, the need for continued vigorous application of the *Burton* fact-specific approach is even more critical to preserving the ability of individuals to redress deprivations of their constitutional rights. This need is particularly great because a number of these newly delegated public functions have not been "traditionally exclusively reserved to the State" and would therefore likely not amount to state action under this Court's public function test. *See Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 352-53 (1974).

ARGUMENT

I. THIS COURT SHOULD REJECT THE CIRCUIT COURT'S EVISCERATION OF THE *BURTON* DECISION BECAUSE THE *BURTON* STANDARD FOR IDENTIFYING STATE ACTION ACCURATELY REFLECTS THE INTENT OF THE FOURTEENTH AMENDMENT AND HAS BEEN AN ESSENTIAL FACTOR IN GUARANTEEING EQUAL RIGHTS

In *Burton*, this Court applied a fact-specific and flexible analysis of state action to hold that a privately owned restaurant leasing public space was a state actor because of its interdependent relationship with the government. In the instant case, the Second Circuit Court of Appeals suggested that *Burton* has limited continued vitality. Although the court referred to *Burton* on occasion, it clearly failed to perform the "sifting [of] facts and weighing [of] circumstances" mandated by *Burton*. As demonstrated below, the Second Circuit's formalistic application of the state action doctrine disregards this Court's decisions and

the doctrine's historical and ongoing importance for safeguarding individual rights and liberties.

A. The State Action Doctrine Is Essential In Guaranteeing Equal Rights

The state action doctrine operates on two levels. On one level, a finding of state action means that the Constitution constrains the challenged conduct, even if the conduct is allegedly private. *See Burton*, 365 U.S. at 726. On a second level, a finding that certain conduct involves state action allows aggrieved plaintiffs to bring suit to challenge such conduct under federal civil rights causes of action, particularly under Section 1983 (42 U.S.C. § 1983) and under the *Bivens*[4] doctrine, to enforce the right of equal protection under the laws and other constitutional rights. *See, e.g., Monroe* v. *Pape*, 365 U.S. 167 (1961).[5] In the absence of a finding of state action, civil rights plaintiffs are relegated to other causes of action not necessarily tailored to the specific injuries they have suffered, except when legislation creates such claims. Moreover, defendants are freed from all constitutional restraints on their behavior.

Access to federal causes of action to redress constitutional violations plays a central role in protecting civil rights and in holding governmental actors accountable for their actions. Without a sufficiently flexible state action doctrine, many of the injuries to aggrieved plaintiffs would go unremedied or underremedied. The fact-specific test articulated in *Burton* allows individuals to redress injuries to their civil rights, even when the State is clothed in the robes of a private entity. In reviewing the instant case, this Court should be mindful of the significant role

[4] In *Bivens* v. *Six Unknown Federal Agents*, 403 U.S. 388 (1971), this Court afforded the plaintiff a cause of action against federal officials for violating his Fourth Amendment rights.

[5] While the doctrine can be viewed on two levels, courts use the same analysis in making the state action determination in either situation. *United States* v. *Price*, 383 U.S. 787, 794 n.7 (1966).

a fact-bound state action doctrine has historically played in preserving constitutional rights and liberties. *See* discussion, *infra*, at Part I.C.

1. *This Court's historic state action decisions have allowed the enforcement of civil rights in a manner that reflects the intent of the Framers of the Fourteenth Amendment*

When Congress enacted the Fourteenth Amendment, it believed that the amendment's provisions would allow Congress to fashion remedies to address private discriminatory action. Thus, Congress enacted numerous civil rights statutes between 1868 and 1875 that regulated private conduct to protect individual rights. *See generally* Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 Mich. L. Rev. 1323 (1952) (detailing history of post-Civil War amendments and civil rights statutes). Congress intended these statutes to redress civil rights abuses effected by private persons who did not necessarily act with express authorization of the state, but whose activity the state would not or could not prevent. *See* Harry A. Blackmun, *Section 1983* and *Federal Protection of Individual Rights—Will the Statute Remain or Fade Away?*, 60 N.Y.U. L. Rev. 1, 5 (1985).

In *The Civil Rights Cases*, 109 U.S. 3 (1883), the Supreme Court limited causes of action under the civil rights statutes to those arising as a result of state action, holding that the provisions of the Fourteenth Amendment applied only to states and not to private individuals. *Id.* at 11. In its earliest interpretations of what constitutes state action, the Court narrowly construed state action as conduct expressly authorized by the state. *See, e.g., Ex Parte Virginia*, 100 U.S. 339 (1879).

This narrow interpretation of state action largely atrophied federal enforcement of civil rights. As then Justice Blackmun noted, following *The Civil Rights Cases* and the national move toward reconciliation, segregation laws spread from railways to streetcars, restaurants, bathrooms, and neighborhoods. Blackmun, *supra*, at 11. With but few exceptions, the only significant inroads into Jim Crow laws came in the area of voting rights, where a clear constitutional mandate existed in the Fifteenth Amendment. *See, e.g., Lane* v. *Wilson*, 307 U.S. 268 (1939); *Myers* v. *Anderson*, 238 U.S. 368 (1915). In fact, only 21 reported cases were decided under Section 1983 prior to 1920. *Maine* v. *Thiboutot*, 448 U.S. 1, 27 (1980) (Powell, J., dissenting).

After World War II, however, it became clear that a narrow interpretation of state action permitted violations of constitutional rights. Thus, the Court properly held in a series of cases that constitutional limitations applied to activity that may previously have been characterized as private action. For example, this Court found a company to be a state actor when it restricted freedom of speech on the streets of a town it owned. *Marsh* v. *Alabama*, 326 U.S. 501 (1946). Similarly, this Court held state court enforcement of a private racially restrictive covenant to be state action for constitutional purposes. *Shelley* v. *Kraemer*, 334 U.S. 1 (1948). Moreover, this Court found a private detective who held a special police officer's card issued by the city to be a state actor when he coerced the confessions of suspects to a crime he had investigated. *Williams* v. *United States*, 341 U.S. 97 (1951). These holdings built on this Court's earlier decisions that a government official is a state actor when his actions, though not specifically authorized by the state, are nonetheless clothed with governmental authority. *See, e.g., Screws* v. *United States*, 325 U.S. 91, 109-10 (1945).

This developing concept of state action analysis better reflected the original intent of the Framers of the Fourteenth Amendment and the drafters of Section 1983. *Monroe* v. *Pape*, 365 U.S. 167, 187 (1961). Thus, the Court in *Monroe* v. *Pape* held that Section 1983 provided individuals with an effective means of redressing

deprivations of their civil rights. *Id.* at 185.[6] Moreover, this Court recognized the link between a finding of state action and the need to make federal causes of action and remedies available to victims of civil rights abuses.

2. *A flexible state action doctrine is inexorably tied to the ability of aggrieved individuals to redress violations of their constitutional rights*

Section 1983 and *Bivens* causes of action have come under recent attack from those who seek to curtail the ability of individuals to redress violations of their constitutional rights. *See* Blackmun, *supra*, at 2. One way to limit access to these causes of action is to employ a narrow, cramped definition of state action. Affirming the decision below would have precisely this effect.

Such a turn of events would upend the constitutional status quo and would revive the misguided interpretation of the Fourteenth Amendment that, between 1890 and 1940, confounded the Framers' intent and eviscerated enforcement of constitutional rights. Those persons and entities that previously would have been state actors under a pragmatic form of analysis would no longer be bound by the Constitution. The threat of private suits under Section 1983 and *Bivens* would no longer deter these actors from infringing on individual rights.

Moreover, aggrieved individuals would likely have no way to redress injuries to their constitutional liberties. While these individuals might bring suit under some other state or federal cause of action, remedies for these claims would often prove insufficient to redress specific constitutional injuries. *See Bivens*, 403 U.S. at 392-94 (1971). As recognized in *Bivens*, a court must tailor remedies to redress the specific injury claimed. *Id.* at 392 (quoting *Bell* v. *Hood*, 327 U.S. 678, 684 (1946)). In fact, the

[6] In its analysis, the Court detailed the legislative history indicating a strong intent to apply Section 1983 to a broad range of actors. *See Monroe*, 365 U.S. at 173-83.

federal right may be founded on interests that differ or may indeed be inconsistent with those interests underlying any alternative claims. *See Bivens*, 403 U.S. at 392-94.[7] Thus, any federal remedy for a constitutional injury supplements other available remedies. *Monroe*, 365 U.S. at 1203. Continued access to these federal remedies is essential to ensure the ongoing vitality of individual rights under the Constitution.

B. Affirming The Second Circuit's Decision Would Seriously Undermine *Burton*

In *Burton*, this Court articulated the principle, well-grounded in prior decisions,[8] that each case raising the state action issue is unique and "necessarily [requires a] fact-bound inquiry." *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 939 (1982) (citing *Burton*). *Burton* required courts to apply a flexible rather than a mechanical ap-

[7] In the instant case, one might suggest that Mr. Lebron could sue Amtrak for breach of contract. The policies underlying contract law, however, differ from those underlying the First Amendment. Contract law enforces the reasonable expectations of the parties while the First Amendment promotes representative self-government, a marketplace of ideas, and individual liberty and autonomy. *See, e.g.*, 1 E. Allan Farnsworth, *Farnsworth on Contracts* § 1.3, at 11 (1990); Gerald Gunther, *Constitutional Law* 1001-02 (11th ed. 1990). In the context of the present case, a private individual would be liable only under contract law for breaching because of the other party's political viewpoint, but when the breaching party is the government, the First Amendment puts different interests into play that deserve redress beyond the scope of contract law.

[8] *See, e.g., Marsh* v. *Alabama*, 326 U.S. 501 (1946) (company treated as state actor regarding restrictions on First Amendment rights to use sidewalks to distribute literature in company town); *Public Utils. Comm'n* v. *Pollak*, 343 U.S. 451 (1952) (private bus company's practice of playing radio programs on buses constituted state action where public utilities commission had reviewed practice and permitted it to continue); *Terry* v. *Adams*, 345 U.S. 461 (1953) (all-white preprimary election within private club treated as state action). As these cases demonstrate, state action jurisprudence of the *Burton* type has never been limited to Fourteenth Amendment issues.

proach in state action cases. The rationale of the *Burton* Court as it pertained to the Equal Protection Clause is no less true for the First Amendment, and no less applicable today:

> Because the virtue of the right to equal protection of the laws could lie only in the breadth of its application, its constitutional assurance was reserved in terms whose imprecision was necessary if the right were to be enjoyed in the variety of individual-state relationships which the Amendment was designed to embrace. For the same reason, to fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is an "impossible task" which "[t]his Court has never attempted." *Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.*

365 U.S. at 722 (quoting *Kotch* v. *Board of River Port Pilot Comm'rs*, 330 U.S. 552, 556 (1947)) (emphasis added).

Burton's facts are set out at length in the petitioners' brief. After careful review of those facts, this Court found that the following indicia of governmental control were present: the land and parking garage building where the restaurant was located were publicly owned and dedicated to "public uses"; maintenance of the building was the responsibility of the Parking Authority; the restaurants's lease was "a physically and financially integral and, indeed, indispensable part of the State's plan" to finance the garage; and the exempt status of the garage redounded to the benefit of Eagle Coffee Shoppe. *Id.* at 723-24. This Court further found that the state "had elected to place its power, property and prestige behind the . . . discrimination." *Id.* at 725. The Court reasoned that because the state could have included provisions in the lease that would have "affirmatively required Eagle to discharge the responsibilities [of the state] under the Fourteenth Amendment," the state had a duty to do so.

It could not "effectively adbicate its responsibilities by . . . ignoring them;" without running afoul of the Constitution. *Id.* Because of these links between the Parking Authority and Eagle, the Court held that

> [t]he State has so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so "purely private" as to fall without the scope of the Fourteenth Amendment.

Id.

The petitioner and the District Court have each dealt at length with the numerous facts that support a finding that the challenged action in the instant case may be fairly attributable to the government. We will not rehearse Amtrak's interrelationship with the government here. Suffice it to say that if the Eagle Coffee Shoppe was so intertwined with the government as to make its actions the actions of the State, *id.*, then the respondent cannot reasonably be viewed for First or Fourteenth Amendment purposes as anything less than a governmental actor. As well put by the District Court, "in both image and reality [the respondent] is impregnated with governmental character and inseparably intertwined with governmental authority and financing." *Lebron*, 811 F. Supp. at 997.

The majority below has attempted to avoid the binding effect of *Burton* by mentioning that decision but not applying the pragmatic test it mandates. The majority justified its superficial review of the facts with a lone footnote stating that "[s]ome commentators have suggested that more recent Supreme Court cases . . . have curtailed Burton's precedential authority." *Lebron*, 12 F.3d at 391 n.1. Surely, the principle of *stare decisis* demands greater respect for—and more deference to—the substantial body of decisional law affirming the *Burton* approach. We respectfully submit that the panel majority's attempt to unsettle decades of precedent should have been premised

on more than the mere musings of "some commentators." [9]

In stark contrast to the divided panel's superficial treatment of *Burton*, this Court has consistently applied meaningful fact-specific state action analysis. This Court's decision in *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972), illustrates this point.[10] *Moose Lodge* involved

[9] The Second Circuit cited four cases as the legal authority for this alleged trend away from *Burton* jurisprudence. These cases show no such trend. In fact, the two decisions of this Court cited by the majority clearly show that this Court consistently has applied *Burton*.

In *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974), and *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Committee*, 483 U.S. 522 (1987), this Court never expressly overruled *Burton*, nor did it criticize *Burton* as the Second Circuit's footnote suggests. To the contrary, in each case the Court applied the *Burton* fact-specific test. In *Jackson*, this Court concluded the facts and circumstances did not mandate that a private utility corporation be deemed a governmental actor. *Jackson*, 419 U.S. at 357-58. See discussion of the *San Francisco Arts* decision, *infra* at 13-14.

Similarly, *Adams* v. *Vandemark*, 855 F.2d 312 (6th Cir. 1988), *cert. denied*, 488 U.S. 1042 (1989), and *Imperiale* v. *Hahnemann Univ.*, 776 F. Supp. 189 (E.D. Pa. 1991), *aff'd*, 966 F.2d 125 (3d Cir. 1992) (per curiam), are inapposite. In *Adams*, the challenged conduced was the termination of plaintiff's employment in a private industry regulated by the government. *Hahnemann* involved the revocation of a medical degree by a private medical school.

[10] Other, more recent examples include *Edmonson* v. *Leesville Concrete Co.*, 500 U.S. 614 (1991) (exercise of peremptory challenges to exclude jurors on account of their race is state action); *Tulsa Professional Collection Serv., Inc.* v. *Pope*, 485 U.S. 478, 486 (1988) ("[W]hen private parties make use of state procedures with the overt, significant assistance of state officials, state action may be found."); *Lugar*, 457 U.S. at 942 (state action through "joint participation" of government and private citizen exists when states creates procedures whereby state officials may attach property on *ex parte* application of one party to a private dispute). *Cf. National Collegiate Athletic Ass'n* v. *Tarkanian*, 488 U.S. 179 (1988) (state university's imposition of disciplinary proceedings against basketball coach in compliance with NCAA rules did not turn NCAA's conduct into state action).

the refusal of a private club to serve food and beverages to a black guest of a club member. Although the parties had *stipulated* that the club "is in all respects, private in nature and does not appear to have any public characteristics," *id.* at 179 n.1 (Douglas, J., dissenting), the Court did not merely accept at face value this stipulation. Rather, the majority expressly applied the *Burton* test, but found that on the specific facts of the case, "there [was] nothing approaching the symbiotic relationship between [the parking authority] and [the restaurant] that was present in Burton." *Id.* at 175.

Importantly, the *Moose Lodge* majority cited *Burton* for the principle that facts must be sifted and circumstances weighed in order to determine whether particular discriminatory conduct constitutes private or state action. *Id.* at 173. The finding that the liquor licensing procedure failed to change the character of the club's act from private to public was not an assumption based upon blind acceptance of the club's label as "private," or even of the parties' stipulation to that effect; instead, both the opinion of the majority and those of the dissenters involve scrutiny and interpretation of the particular facts of the case, as *Burton* requires.

In attempting to deny the Court's continuing reliance on the flexible *Burton* test, the Second Circuit erroneously referred to *San Francisco Arts & Athletics* v. *United States Olympic Committee*, 483 U.S. 522 (1987). That case was one in which the U.S. Olympic Committee ("USOC") sought an injunction to prevent San Francisco Arts and Athletics from using the word "Olympic" and the symbol of the International Olympic Committee in promoting the "Gay Olympic Games."

As in *Moose Lodge*, the Court recognized at the outset that the actor in question was a private entity, *id.* at 543-44, yet both the majority and the dissenters made that fact the point of departure rather than the end of

their inquiry.[11] Of particular importance to the majority's finding of an absence of state action was the fact that, during the 1980 boycott of the Moscow Olympics, the President and the federal government were unable to exercise "any type of 'de facto' control over the USOC"; they had to rely on persuasion to secure the USOC's participation in the boycott.[12] *See id.* at 545 n.27. Thus, the issue was not whether the USOC was chartered as a private corporation, but whether it "can or does" *function* as one. *Id.* at 546 n.29. The flexible, fact-specific approach of *Burton* jurisprudence was necessary to make such a determination.

As these cases reveal, on several occasions the Court used the *Burton* test and determined that the actor in question was purely private and therefore not subject to constitutional restrictions. *See, e.g., Moose Lodge*, 407 U.S. at 173-75; *Tarkanian*, 488 U.S. at 195. But even in those cases, the *Burton* approach was essential in making an informed assessment of whether there was a " 'sufficiently close nexus between the State and the challenged action . . . so that the action of the [private actor] may fairly be treated as that of the state itself.' " *Blum* v. *Yaretsky*, 457 U.S. 991, 1004 (1982) (quoting *Jackson*, 419 U.S. at 351). Even in cases that seemed on their face to involve purely private action, this Court has held time and time again that the constitutional rights at stake

[11] *See San Francisco Arts*, 483 U.S. at 548 (O'Connor, J., concurring in part and dissenting in part) (arguing that facts and circumstances support a finding that USOC and government "are joint participants in the challenged activity and as such are subject to the equal protection provisions of the Fifth Amendment"); *id.* at 548-49 (Brennan, J., dissenting) (reasoning that USOC is governmental actor because it "performs important governmental functions," and because there exists a "sufficiently close nexus" between government and action of USOC).

[12] Of course, it is just such *de facto*, and indeed *de jure*, government control of Amtrak that Judge Leval found to exist in the instant case. *Lebron*, 811 F. Supp. at 997-98.

are important enough to warrant taking a hard look to ensure that such appearances are not deceiving.

This Court has consistently rejected the panel majority's view that the incidental labeling of an entity as "non-governmental" is sufficient to insulate its actions under all circumstances from the constitutional strictures. To affirm the decision of the court below would threaten to unravel this Court's carefully wrought state action jurisprudence and leave lower courts without guidance for evaluating future claims of quasi-state action. This evisceration of *Burton* would reverse a long history of safeguarding civil liberties and civil rights that ensured that all indicia of public control would be considered in making state action determinations.

C. A Fact-Specific Approach To State Action Has Historically Allowed Courts To Defeat Attempts By Governments To Privatize Traditional Public Services As A Pretext For Avoiding Constitutional Obligations

Though theoretical in its conception, this long-standing history of a fact-intensive state action doctrine has had quite tangible consequences. In the aftermath of *Brown* v. *Board of Education*, 347 U.S. 483 (1954), many southern states and localities attempted to avoid their constitutional obligation to desegregate by "privatizing" traditional government services, such as transportation, education, and parks and recreational facilities. The flexible, fact-intensive approach to state action adopted by this Court and by the lower federal courts played a critical role in ending "massive resistance" to desegregation in the South.

1. *Public Transportation*

On December 1, 1955, Rosa Parks refused to relinquish her seat and move to the back of a public bus in Montgomery, Alabama. Her act of civil disobedience ignited a year-long struggle in Montgomery—the Mont-

gomery bus boycott—that culminated in a Supreme Court decision, *Gayle* v. *Browder*, 352 U.S. 903 (1956), ending segregation on the city's buses and effectively overruling the discredited doctrine of "separate but equal" announced in *Plessy* v. *Ferguson*, 163 U.S. 537 (1896).

In the aftermath of the *Browder* decision, and as part of the southern strategy of massive resistance to desegregation, local officials in Birmingham, Alabama devised a scheme to keep segregation intact on the city's buses. On the day that the old segregation ordinances in Birmingham were repealed, the city enacted a new ordinance giving the local bus company the power to " 'promulgate such rules and regulations for the seating of passengers on public conveyances . . . as are reasonably necessary to assure the speedy, orderly, convenient, safe and peaceful handling of passengers.' " *Boman* v. *Birmingham Transit Co.*, 280 F.2d 531, 532-33 (5th Cir. 1960) (quoting the new ordinance). The new ordinance also provided that a willful refusal to obey the request of a driver enforcing the company's seating policy constituted a breach of the peace. *Id.* at 533. After the city promulgated its new ordinance, the bus company painted signs in the front and rear of its buses that read: "White Passengers Seat From Front, Colored Passengers From Rear." Soon after the signs were painted, a group of blacks disregarded them by occupying seats near the front of a bus. When the blacks refused to obey the driver's request that they move to the back, they were arrested for breach of the peace and related infractions. They subsequently sued the bus company and the Birmingham Board of City Commissioners, claiming that the signs violated the Constitution by designating seating according to race. *Id.* at 532-33.

The federal District Court held that the racially designated seating did not violate the constitutional rights of the plaintiffs because it did not constitute state action.[13]

[13] The District Court's decision is reprinted in 4 Race Rel. L. Rep. 1027 (1959).

The District Court found that "[t]he evidence wholly fails to reveal that [city officials] had formed any policy, actually or tacitly, to apply [the new ordinance] in a racially discriminatory manner." [14]

A divided Fifth Circuit panel reversed the District Court's judgment. The court held that because the bus company was a public utility holding a special franchise to operate on the city's streets, state action was present. *Boman*, 280 F.2d at 534.

The Fifth Circuit's courageous decision marked an important victory for the civil rights movement. No longer could city officials resist their constitutional obligation to desegregate by privatizing an essential public service. A narrow and inflexible conception of state action would have left the plaintiffs in *Boman* at the mercy of county and bus company officials determined to maintain the Jim Crow regime. If the Birmingham Transit Company is a state actor because it holds a special franchise to operate on the city's streets, then Amtrak, created, controlled, and subsidized by the federal government, should likewise be deemed a government actor. For this Court to hold otherwise would diminish the importance of decisions like *Boman* and *Burton* in protecting civil rights.

2. *Public Education*

In the field of public education, efforts to desegregate also met with massive resistance in the South. Many southern states and localities attempted to avoid the command of *Brown* v. *Board of Education* by closing the public schools and setting up programs to facilitate segregation by private schools and organizations.

The Supreme Court confronted one county's effort to privatize its public schools in *Griffin* v. *County School Board of Prince Edward County*, 377 U.S. 218 (1964).

[14] Randall Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 Yale L.J. 999, 1059 (1989).

When the supervisors of Prince Edward County, Virginia were faced with a court order to desegregate their schools, they refused to levy any school taxes for the 1959-1960 academic year. As a result, the county's public schools did not open. *Id.* at 222-23. A private group, the Prince Edward School Foundation, was formed to operate private schools for white children in the county. *Id.* at 223. During the 1959-1960 school year, those schools were supported entirely by private contributions. However, in 1960, the Virginia General Assembly adopted a tuition grant program making every child, regardless of race, eligible for certain tuition grants to attend private schools or public schools outside his locality. The program also authorized localities to provide their own grants. The Prince Edward Board of Supervisors then passed an ordinance providing further tuition grants to children attending the Prince Edward School Foundation's schools. *Id.*

This Court held that the Prince Edward County School Board's decision to close the county's public schools, while contributing to the support of the private, segregated white schools that replaced them, denied black students the equal protection of the laws. *Id.* at 232. While the Court did not specifically address the state action issue, it found that because the Prince Edward public schools had been closed for an invidious reason—to keep the school district segregated—the Board's action violated the equal protection clause. *Id.*[15]

[15] Although the *Griffin* Court's holding was based in part on a finding of invidious purpose, this Court has never held that an intent or purpose to evade constitutional limitations is required for a finding of state action. *See Burton*, 365 U.S. at 725 & n.2 ("It is of no consolation to an individual denied the equal protection of the laws that it was done in good faith"); *Wimbish* v. *Pinellas County*, 342 F.2d 804 (5th Cir. 1965) (state action found where county leased land for golf course to private tenant who discriminated against blacks, notwithstanding the fact that county had no discriminatory purpose in executing the lease). *See also Muir* v. *Louisville Park Theatrical Ass'n*, 347 U.S. 971 (1954), in which a city leased its amphitheater for the summer to a private party who denied admission to blacks. No discriminatory purpose on the city's part was shown. Nevertheless, the Supreme Court vacated a lower court decision denying relief to the blacks.

The *Griffin* Court cited an earlier case, *Hall* v. *St. Helena Parish School Board*, 197 F. Supp. 649 (E.D. La. 1961), in which the District Court invalidated a Louisiana statute that provided "a means by which public schools under desegregation orders may be changed to 'private' schools operated in the same way, in the same buildings, with the same furnishings, with the same money, and under the same supervision as the public schools." *Id.* at 651. This Court affirmed the District Court's judgment invalidating the Louisiana statute as a denial of equal protection. *St. Helena Parish Sch. Bd.* v. *Hall*, 368 U.S. 515 (1962).[16]

While *Griffin*, *Hall*, and *Cooper* did not directly discuss the state action issue, all three cases are significant here because this Court was firm in rejecting attempts to preserve segregation through the privatization of public services. Rather than adopting a narrow and rigid approach to state action, the Court looked to larger constitutional principles in holding that the state cannot delegate an essential governmental function to private entities to circumvent the command of the Fourteenth Amendment.

3. *Public Parks and Recreational Facilities*

This Court has long resisted attempts to privatize other public faciliites in order to avoid the requirements of the Constitution. *Evans* v. *Newton*, 382 U.S. 296 (1966), illustrates the approach that the Court has traditionally

[16] In an earlier case, *Cooper* v. *Aaron*, 358 U.S. 1 (1958) (also cited in *Griffin*), the Supreme Court denied Arkansas' application to suspend a judicially approved school integration plan for the city of Little Rock, explaining that, "[s]tate support of segregated schools through any arrangement, management, funds, or property cannot be squared with the [Fourteenth] Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws." *Id.* at 19.

taken in such cases. In 1911, Senator Bacon devised land to Macon, Georgia, to be used as a park for whites only. After this Court's decision in *Pennsylvania* v. *Board of Trusts*, 353 U.S. 230 (1957) (finding state action when public officials act as trustees under a private will requiring racial discrimination), the city permitted blacks to use the park. Bacon's heirs and others sued to remove the city as trustee; black citizens intervened in opposition; the city resigned as trustee; and the Georgia courts accepted the city's resignation and appointed private individuals as trustees so that the trust's purpose would not fail.

Justice Douglas, writing for the Court, reversed. Because of the city's historic role in maintaining the park, and because the park served a public function, it was subject to the requirements of the Fourteenth Amendment regardless of who had title to the park under state law:

> The momentum [the park] acquired as a public facility is certainly not dissipated ipso facto by the appointment of "private" trustees. . . . If the municipality remains entwined in the management or control of the park, it remains subject to the restraints of the Fourteenth Amendment just as the private utility in *Public Utilities Commission of District of Columbia* v. *Pollak*, 343 U.S. 451, 462 [(1952)], 72 S.Ct. 813, 96 L.Ed. 1068, remained subject to the Fifth Amendment because of the surveillance which federal agencies had over its affairs.

Id. at 301-02.

The *Evans* Court relied on *Public Utilities Commission* v. *Pollak*, 343 U.S. 451 (1952). In *Pollak*, as in this case, the Court considered whether a public utility operating under the authority of Congress was a government actor. In finding government action, the Court noted:

> [W]hen authority derives in part from Government's thumb on the scales, the exercise of that power by private persons becomes closely akin, in some respects, to its exercise by Government itself.

Id. at 462 n.8 (quoting *American Communications Ass'n* v. *Douds*, 339 U.S. 382, 401 (1950)).[17]

This Court followed the reasoning of *Evans* in *Gilmore* v. *City of Montgomery*, 417 U.S. 556 (1974). In *Gilmore*, the city of Montgomery granted exclusive possession and control of its recreational facilities to all-white private schools and groups affiliated with such schools in an effort to circumvent this Court's desegregation rulings in the area of public recreation. Because Montgomery's scheme had the effect of creating enclaves of segregation and depriving blacks of equal access to parks and recreational facilities, this Court held that the lower courts had correctly enjoined it. *Id* at 566-69.

A superficial application of the state action doctrine in these cases would have permitted state and local governments to delegate control of public land and facilities to "private" entities determined to maintain segregation. Such a result would have left America's parks, golf courses, beaches, and other public areas closed to individuals who happened to be of the "wrong" color.

As this survey demonstrates, a pragmatic, fact-specific state action test has enabled individuals to protect their constitutional rights. Forty years ago, in *Brown* v. *Board of Education*, this Court noted:

> In approaching this problem [the effect of segregation on public education], we cannot turn the clock back to 1868 when the [Fourteenth] Amendment was adopted, or even to 1896 when *Plessy* v. *Fergu-*

[17] The similarities between *Pollak* and *Lebron* are striking. Both cases involve state action and First Amendment issues. Amtrak, like the bus company whose conduct was at issue in *Pollak*, (1) operates as a public utility under the authority of Congress; (2) enjoys a virtual monopoly in the services it provides; (3) is controlled by a federally appointed Board that is responsible for the challenged conduct; and (4) is subject to regulatory supervision under agencies authorized by Congress.

> *son* was written. We must consider public education in light of its full development and its present place in American life throughout the Nation.

347 U.S. at 492-93. Similarly, this Court must not turn the clock back on decades of state action jurisprudence.

II. *BURTON* MUST NOT BE UNDERMINED AT A TIME WHEN GREAT FLEXIBILITY IS NEEDED TO ADDRESS THE INCREASINGLY "NONOBVIOUS INVOLVEMENT OF THE STATE IN PRIVATE CONDUCT"

A. There Is A Current Trend Toward Privatization Of Public Services

Today, increasing privatization of essential services traditionally provided by governments has created complex private-state relationships that have in some instances virtually eliminated the distinction between the public and private sectors.[18] In this time of changing relationships between the private and public sectors, it is imperative that this Court vigorously apply the *Burton* test and thereby continue to look beyond the form of an entity to its substance to discern whether the specific facts of each case require a finding of state action.

The past two decades have seen an increasing trend among all levels of government to delegate essential public services to the private sector. Such privatization creates amalgams of public and private entities to carry out government functions in a variety of arrangements that are not formally governmental. These entities, however, provide services at the behest of governments, often

[18] *See* Ronald C. Moe, *Exploring the Limits of Privatization*, 47 Pub. Admin. Rev. 453, 456 (1987) (describing Federal Assets Disposition Association, a corporation created by private citizens under Colorado law with capital provided by Federal Savings and Loan Insurance Corporation, a federal agency, as " 'crypto-quasi-pseudo' entity living precarious existence in the twilight zone between the public and private sectors" that "seeks to be private in its direction and interests but public in its rights and privileges").

under significant government control, and in reliance on vast public resources. "What occurs, in variant forms, is the emergence of 'third-party government.' " Moe, *supra* note 18, at 457.

Broad areas of services traditionally provided by the public sector have been targets of privatization efforts. In 1988, the President's Commission on Privatization recommended privatization in one form or another of a broad spectrum of federal government activities including low-income housing, housing finance, federal loan programs, air traffic control, education, postal services, Medicare, and urban mass transit. President's Commission on Privatization, *Privatization: Toward More Effective Government* (1988). Indeed, the President's Commission included Amtrak in its study and recommended a set of initiatives designed to place Amtrak in the *private* sector. *Id.* at 172-75.

Many localities have authorized privatization of their public schools, either by granting charters to private companies to operate schools or by contracting with private companies to manage public schools. *See Private Management of Public Schools*, 4 C.Q. Researcher 265 (1994). While these schools are operated by the private sector, they are publicly funded, use public facilities, and are subject to government regulation. Such initiatives are currently being implemented or considered in Arizona, California, Colorado, Connecticut, Florida, Hawaii, Illinois, Kansas, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, Ohio, Tennessee, Texas, Virginia, Wisconsin, and the District of Columbia. *Id.* at 273; *see also* Mary Jordan, *Charter Group Banking on a Profitable National Network of Elite Schools*, Wash. Post, Apr. 30, 1994, at A8.

Correctional facilities similarly have been subject to privatization efforts. As of 1992, there were sixty privately operated prisons throughout fourteen states. *Pri-*

vatization, 2 C.Q. Researcher 977, 985 (1992).[19] Other essential services traditionally provided by the public sector that are the subject of privatization efforts include police protection, water supply and treatment, solid waste collection, roads and other infrastructure, and health care.[20]

The impetus for privatization efforts stems from the belief that the private sector can deliver services with increased efficiency and economy.[21] Even though malevolent intent is not the driving force as it was in those cases discussed in Part I.C., in which this Court found privatization to be impermissible, the threat of circumventing constitutional obligations is a common thread. Proponents of privatization point to substantial cost savings from avoiding constitutional constraints as one of the principal economic benefits of privatization. As one commentator noted:

> One of the attractions of prison privatization for state and local governments is the belief that contracting prison management to private firms will relieve the government of the burden of defending the multitude of individual and class-wide civil rights actions and the expense of complying with compre-

[19] These numbers represent growth in the number of private correctional facilities that has increased dramatically over the past few years. Samuel J. Brakel, *Private Corrections, in Privatizing the United States Justice System: Police, Adjudication, and Corrections Services from the Private Sector* 254, 254 (Gary W. Bowman *et al.* eds., 1992).

[20] *See generally* Robert A. Dorwart & Sherrie S. Epstein, *Privatization and Mental Health Care: A Fragile Balance* (1993); E.S. Savas, *How to Shrink Government: Privatizing the Public Sector* (1982); *Privatizing the United States Justice System, supra* note 19.

[21] *See, e.g.*, E.S. Savas, *supra* note 20; James K. Stewart, *The Justice System and the Private Sector: Time for an Expanded Partnership, in Privatizing the United States Justice System, supra* note 19, at 2.

> hensive and often financially burdensome court orders.[22]

Another commentator described the impact of privatization on constitutionally protected rights:

> By turning production of public services over to private agencies, governments can effectively evade most constitutional restraints. . . . To political leaders or public administrators who view constitutional due process requirements as onerous limits on the efficiency of government agencies, the possibility of escaping such restraints can only add luster to the possibilities of privatization.[23]

Privatization of numerous public services further blurs the distinction between the private and public sectors. While some "privatized" public services may not constitute state action under the *Burton* test, others will. "The Government is free, of course, to 'privatize' some functions it would otherwise perform. But such privatization ought not automatically release those who perform Government functions from constitutional obligations." *San Francisco Arts*, 483 U.S. at 560 (Brennan, J., dissenting). Therefore, a searching state action inquiry consistent with *Burton* is imperative to penetrate the formal structure of an entity and to discern whether its substance reveals state action. This need is particularly great since, as discussed below, many privatized functions involve public services that have not been exclusively provided by the State in the past and accordingly may not be deemed to be state action under this Court's exacting public function test.

[22] Susan L. Kay, *The Implication of Prison Privatization on the Conduct of Prisoner Litigation Under 42 U.S.C. Section 1983*, 40 Vand. L. Rev. 867, 868 (1987).

[23] Harold J. Sullivan, *Privatization of Public Services: A Growing Threat to Constitutional Rights*, 47 Pub. Admin. Rev. 461, 464-65 (1987).

B. In The Absence Of *Burton*, This Trend Towards Privatization Will Immunize Broad Categories Of Conduct Properly Subject To Constitutional Constraints

Without the *Burton* fact-specific test, the trend towards privatization of public functions will create a dangerously wide void in the state action doctrine. The problem is compounded because the public function test, the only state action test most likely to be applicable to privatized public services in the absence of *Burton*, has been interpreted as an exacting, "static" standard that is not sufficiently flexible to "resemble contemporary experience." *San Francisco Arts*, 483 U.S. at 549 n.1 (Brennan, J., dissenting).

To establish state action under the public function test, a private entity must be engaged in a function that has been "traditionally exclusively reserved to the State." *See, e.g., San Francisco Arts*, 483 U.S. at 545; *Rendell-Baker* v. *Kohn*, 457 U.S. 830, 842 (1982); *Blum*, 457 U.S. at 1011; *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149, 158 (1978); *Jackson*, 419 U.S. at 352. Some of the public functions being delegated to the private sector, such as prisons, have been exclusively provided by the State. As a result, these functions could well be deemed government action under the narrow public function test and continue to be subject to constitutional limitations.[24] Many other newly delegated functions, however, have not been exclusively performed by the State. Accordingly, these newly delegated functions may well not satisfy the public function test, and therefore they likely would be immunized from constitutional constraints.

In light of the changing nature of private-public relationships, it is particularly important that this Court maintain the pragmatic approach to the state action doctrine adopted in *Burton*. The *Burton* test will continue to allow courts to make reasonable judgments in particular cases about the presence or absence of state action. By preserving the *Burton* test, this Court will secure the ability of courts to ensure that governments cannot circumvent their constitutional obligations. As a result, the Court will prevent a departure from a long line of precedent protecting civil rights and civil liberties from infringement by abusive state action.

[24] Ira P. Robbins, *The Legal Dimensions of Private Incarceration*, 38 Am. U.L. Rev. 531, 604 (1989) (arguing that private incarceration would be found to constitute state action under the public function test).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Second Circuit should be reversed.

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APPENDIX

STATEMENTS OF INDIVIDUAL *AMICI*

The *NAACP Legal Defense and Educational Fund, Inc.* ("the Fund") is a non-profit corporation that was established for the purpose of assisting African Americans in securing their constitutional and civil rights. This Court has noted the Fund's "reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation." *NAACP v. Button*, 371 U.S. 415, 422 (1963). Attorneys for the Fund were counsel in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), *Evans v. Newton*, 382 U.S. 296 (1966), and other leading cases dealing with the issue of state action within the meaning of the Fourteenth Amendment.

The *National Asian Pacific American Legal Consortium* is a not-for-profit, nonpartisan organization whose mission is to advance the legal and civil rights of Asian Pacific Americans through a national collaborative structure that pursues litigation, advocacy, public education, and public policy development. NAPALC addresses violence, immigration, voting rights and other issues. As a civil rights organization, the Consortium is very concerned about guaranteeing access to Federal courts for litigants who believe that their rights have been violated by governmental actions.

The *National Women's Law Center* ("Center") is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since its inception in 1972, the Center has actively participated in litigation to secure the rights of women and has participated in major Supreme Court cases addressing women's civil and constitutional rights under the law.

People For the American Way ("People For") is a nonpartisan, education-oriented citizens' organization es-

tablished to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic and educational leaders devoted to our nation's heritage of tolerance, pluralism and liberty, People For now has over 300,000 members nationwide. People For has been actively involved in cases seeking to redress violations of Americans' fundamental constitutional and statutory rights. In this regard, People For has represented parties in litigation and filed *amicus* briefs before this Court in cases implicating fundamental rights under the First Amendment, the Fourteenth Amendment, and the major federal civil rights laws. People For is filing this *amicus* brief because of the importance of preserving and conscientiously applying the Court's well-established precedent in *Burton v. Wilmington Parking Authority* in order to protect and enforce Americans' fundamental federal constitutional and civil rights.

The *Puerto Rican Legal Defense & Education Fund, Inc.* (PRLDEF) is a national civil rights litigating organization dedicated to protecting and furthering the rights of Puerto Ricans and other Latinos. PRLDEF has represented and continues to represent clients with constitutional claims. The issue of state action is important to PRLDEF clients who often face First, Fifth and Fourteenth Amendment violations by quasi-governmental agencies.

Founded in 1971, the *Women's Legal Defense Fund* (WLDF) is a national advocacy organization working at federal and state levels to promote policies that help women achieve equal opportunity, quality health care, and economic security for themselves and their families.

WLDF has long advocated broad application of the state action doctrine to ensure that the constitutional guarantee of equal protection under the law protects women against invidious gender discrimination. Indeed, a narrow interpretation of state action doctrine could also constrict women's rights under state Equal Rights Amendments.